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9 **UNITED STATES DISTRICT COURT**  
10 **WESTERN DISTRICT OF WASHINGTON**  
11 **AT SEATTLE**

12 STATE OF WASHINGTON,

13 Plaintiff,

14 v.

15 UNITED STATES DEPARTMENT OF  
16 HEALTH AND HUMAN SERVICES;  
ALEX M. AZAR, in his official capacity as  
the Secretary of the United States  
Department of Health and Human Services,

17 Defendants.

NO. 2:20-cv-01105

DECLARATION OF  
MICHELLE ROBERTS

18 I, Michele Roberts declare under penalty of perjury under the laws of the United States  
19 of America that the foregoing is true and correct:

20 1. I am over the age of 18, have personal knowledge of the facts and circumstances  
21 in this Declaration, and competent testify in this matter.

22 2. I am the acting Assistant Secretary for the division of Prevention and Community  
23 Health (PCH) at the Washington States Department of Health (DOH). I have held this position  
24 since June 1, 2020. Prior to that, I served as the Director of Office of Immunization and Child  
25 Profile in PCH for over six years, and as the health promotion section manager in the office for  
26 9 years before that, I also completed a fellowship at the Centers for Disease Control and

1 Prevention in 2002-2004. I earned a master of public health degree from the Johns Hopkins  
 2 University. I also hold a Bachelor of Liberal Arts degree in Biology from Whitman College. I  
 3 am a Master Certified Health Education Specialist, and possess 20 years of experience public  
 4 health policy and program administration.

5 3. As acting Assistant Secretary of Health, I work directly with the Secretary of  
 6 Health and members of the agency executive team on high-level policy and strategic issues. I  
 7 lead PCH, which includes four offices, more than 200 staff members, and a wide range of  
 8 programs and projects. PCH oversees a broad portfolio of services and works extensively with  
 9 state, local, tribal, and community partners to improve the health of all Washingtonians. The  
 10 biennial budget for PCH is \$648.9 million, including \$390.9 million in federal funding.

11 4. DOH is Washington's statewide public health agency. It is within the executive  
 12 branch, with the Secretary of Health reporting directly to the governor. DOH programs and  
 13 services help to prevent illness and injury, promote healthy places to live and work, provide  
 14 information to help people make good health decisions, and ensure our state is prepared for  
 15 emergencies. PCH has programs and services in the following major areas: injury and violence  
 16 prevention; reproductive health; maternal and child health; nutrition services; immunizations;  
 17 and cancer and chronic disease prevention and control.

18 5. I understand the United States Department of Health and Human Services (HHS)  
 19 has issued a new regulation entitled "Nondiscrimination in Health and Health Education  
 20 Programs or Activities, Delegation of Authority," 85 Fed. Reg. 37160-248 (the "Final Rule"),  
 21 which was published in the Federal Register on June 19, 2020. As I understand it, the new  
 22 regulation will restrict the scope of Section 1557 of the Affordable Care Act in certain ways,  
 23 including but not limited to (1) eliminating protection from healthcare discrimination on the  
 24 basis of pregnancy termination, sexual orientation, and transgender status and/or gender identity,  
 25 (2) reducing the number and type of healthcare entities that must comply with the non-  
 26 discrimination provision of Section 1557, (3) attempting to expand the permissible conscience

1 objections, and (4) eliminating the requirement that healthcare entities provide certain  
2 information about the non-discrimination protections and the availability of language assistance  
3 to individuals with limited English proficiency (LEP).

4 6. As a result of these changes, the new regulation will result in discrimination by  
5 healthcare providers, administrators of healthcare coverage, and others against women with a  
6 history of pregnancy termination, gay and lesbian individuals, and transgender individuals. As  
7 HHS found in the previous version of the regulation, prohibiting discrimination against  
8 transgender individuals and women with a history of pregnancy termination results in more  
9 transgender individuals and women “obtaining coverage and accessing services.” 81 Fed. Reg.  
10 31460. And, as HHS admits in the new regulation, removing these protections will result in at  
11 least some healthcare entities declining to provide coverage consistent with the previous version  
12 of the regulation. 85 Fed. Reg. 37181.

13 7. HHS also found in the previous version of the regulation that greater healthcare  
14 coverage for transgender individuals and women would result in reduced violence against  
15 affected individuals, reduced depression and suicide, and declines in substance abuse, smoking,  
16 and alcohol abuse rates. 81 Fed. Reg. 31460. The reverse is also true, and if the new regulation  
17 is allowed to take effect, Washington State will bear the cost of these negative health outcomes  
18 in the form of paying for subsidized healthcare services for marginalized and lower income  
19 Washingtonians.

20 8. HHS also previously found that transgender individuals who have experienced  
21 healthcare discrimination often postpone or do not seek needed healthcare, which may lead to  
22 negative health outcomes. 81 Fed. Reg. 31460. Concerns over discrimination in healthcare is  
23 one of the major barriers to transgender individuals seeking healthcare services. *Id.* If allowed  
24 to take effect, the new regulation will result in Washingtonians who are transgender or women  
25 with a history of pregnancy termination delaying or choosing not to seek preventative healthcare  
26 services and other medical services, which will have disastrous long term effects.

9. According to the Washington State Office of Financial Management (OFM), the population of Washington State is approximately 7,656,200 people as of April 1, 2020.<sup>1</sup> Declaration of Thea Mounts, ¶ 5.

10. As of 2018, the Washington State Office of Financial Management (OFM) estimates that 1,385,380 people in Washington State receive healthcare coverage under a private-sector employer's self-insured or self-funded group health plan, and 198,301 Washingtonians receive healthcare coverage through a healthcare plan that is part of the Federal Employees Health Benefits Program. Declaration of Thea Mounts, ¶¶ 7, 9.

11. I understand that, because of provisions of law in the Employee Retirement Income Security Act of 1974 (ERISA) and the Federal Employees Health Care Protection Act of 1998, Washington State laws that prohibit discrimination in healthcare on the basis of pregnancy termination, sexual orientation, and transgender status or gender identity do not apply to these plans. Declaration of Mike Kreidler, ¶¶ 10-14.

12. Because of ERISA and the law applicable to the FEHBP, the healthcare coverage plans of approximately 1,583,681 Washingtonians will not be prevented by Washington State law from discriminating on the basis of pregnancy termination, sexual orientation or transgender status or gender identity. *Id.* at ¶ 14.

13. A recent study confirms that approximately 0.35% to 1.08% of the Washington population identify as transgender.<sup>2</sup> Based on this, DOH estimates that between approximately 5,543 and 17,104 of the 1,583,681 Washingtonians have healthcare coverage to which the Washington State law prohibitions on transgender discrimination will not apply.

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<sup>1</sup> Press Release, Washington State Office of Financial Management, Washington tops 7.6 million residents in 2020, *available at* [https://www.ofm.wa.gov/sites/default/files/public/dataresearch/pop/april1/ofm\\_april1\\_press\\_release.pdf](https://www.ofm.wa.gov/sites/default/files/public/dataresearch/pop/april1/ofm_april1_press_release.pdf) (last visited July 3, 2020).

<sup>2</sup> Flores, et al., *How many Adults Identify as Transgender in the United States*, Williams Institute, June 2016, *available at* <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf>.

14. In addition, approximately 5.2% of the population in Washington is lesbian, gay, or bisexual,<sup>3</sup> so that an additional 82,351 such persons are expected to lose the protection of the anti-discrimination provisions of Washington law in healthcare if the Final Rule takes effect. Additionally, there were approximately 54,320 pregnancy terminations in 2014, 2015, and 2016,<sup>4</sup> and about 249,845 Washington women aged 15-44 in 2019,<sup>5</sup> so that DOH estimates that at least 20% of women in this age group have had a pregnancy termination, and therefore hundreds of thousands of women who have had a pregnancy termination will lose protection from healthcare discrimination on that basis if the Final Rule takes effect.

15. In 2017, the first year in which the previous version of the regulation was in effect, 95.1% of insurance companies had removed language excluding healthcare related to gender transition.<sup>6</sup> Because of this, DOH expects between 5,271 and 16,266 transgender Washingtonians to lose healthcare coverage for transgender healthcare services like hormone therapy and surgical gender transition procedures if the new regulation is allowed to take effect. This does not even include the loss of other healthcare treatment because of discrimination.

16. According to the National Center for Transgender Equality's U.S. National Transgender Survey of 2015—perhaps the most thorough and definitive source of data about the transgender community in the United States to date, 8% of the 87% of respondents who visited

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<sup>3</sup> LGBT Demographic Data Interactive, January 2019, the Williams Institute of the UCLA School of Law, available at <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=53#demographic> (last visited July 11, 2020).

<sup>4</sup> Jones RK, et al., Abortion Incidence and Service Availability in the United States, 2017, Guttmacher Institute, 2019, State Data Table at p. 15, available at [https://www.guttmacher.org/sites/default/files/report\\_downloads/abortion-incidence-service-availability-us-2017-tables.pdf](https://www.guttmacher.org/sites/default/files/report_downloads/abortion-incidence-service-availability-us-2017-tables.pdf) (last visited July 11, 2020).

<sup>5</sup> Washington State Office of Financial Management, 2019 Data Book, Population, available at <https://www.ofm.wa.gov/sites/default/files/public/dataresearch/databook/pdf/population.pdf> (last visited July 11, 2020).

<sup>6</sup> Out2Enroll, Summary of Findings: 2017 Marketplace Plan Compliance with Section 1557, available at <https://out2enroll.org/out2enroll/wp-content/uploads/2015/10/Report-on-Trans-Exclusions-in-2017-Marketplace-Plans.pdf> (last visited July 3, 2020).

1 a doctor in the preceding year were denied gender transition-related healthcare services.<sup>7</sup>  
 2 Additionally, at least 76% of the 25% who experienced insurance problems were denied  
 3 coverage for hormone therapy or surgical procedures related to gender transition.<sup>8</sup> These figures  
 4 are from 2015, and as such, pre-dated the previous version of the Final Rule. As a result, we can  
 5 expect similar figures for denial of services and coverage if the Final Rule takes effect. This  
 6 means, in Washington, we can expect from year to year between 367 to 1,132 individuals to be  
 7 denied transition-related services from a provider, and we can expect from year to year between  
 8 1,002 to 3,090 individuals to be denied coverage for such services, including between 725 and  
 9 2,236 for surgical procedures. There will undoubtedly be other losses of healthcare treatment as  
 10 a result of healthcare discrimination, including denials of other kinds of healthcare services to  
 11 transgender individuals and denials of healthcare services to lesbian, gay, and/or bisexual  
 12 individuals and women with histories of pregnancy termination.

13 17. HHS previously recognized that greater healthcare coverage for transgender  
 14 individuals and women would result in reduced violence against affected individuals; reduced  
 15 depression and suicide; declines in substance abuse, smoking, and alcohol abuse rates; and  
 16 declines in other health disparities resulting from healthcare discrimination. 81 Fed. Reg. 31460.  
 17 The reverse is also true.

18 18. According to the National Transgender Survey, 49% of transgender individuals  
 19 who want to transition were experiencing serious psychological distress, and that figure drops to  
 20 31% six years after transition and to 24% ten years or more after transition.<sup>9</sup> This is supported  
 21 by the American Medical Association, which found that “individuals with gender dysphoria who  
 22 have undergone no gender confirmation treatment are twice as likely to experience moderate to

23 <sup>7</sup> National Center for Transgender Equality 2015 U.S. Transgender Survey (“U.S. Transgender Survey”),  
 24 p. 96, available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (last visited  
 25 July 11, 2020).

25 <sup>8</sup> U.S. Transgender Survey, p. 95.

26 <sup>9</sup> U.S. Transgender Survey, p. 107.

1 severe depression and four times more likely to experience anxiety than their surgically-affirmed  
2 peers.”<sup>10</sup>

3 19. With approximately 1,369 to 4,222 transgender persons expected to be denied  
4 services or coverage for hormone therapy or transition-related surgery every year, we can expect  
5 the higher rate of 49% to suffer moderate to severe depression, or between 670 to 2,069 new  
6 cases of moderate to severe depression in Washington if the Final Rule takes effect.

7 20. We know that depression leads to unemployment and loss of income.<sup>11</sup> Based on  
8 peer-reviewed research in this area, we expect approximately 80 to 248 more lost jobs for every  
9 five year period beginning when the new regulation takes effect. That means at least 320 to 992  
10 jobs lost over the next two decades because of depression caused by denial of transgender  
11 healthcare services as a result of the new regulation. This does not even include other job losses  
12 because of violence against transgender persons or substance abuse, both of which are likely to  
13 occur in the absence of healthcare coverage for transgender individuals according to HHS.

14 21. We also know that fear of discrimination leads transgender persons to delay  
15 healthcare. The National Transgender Survey found that 23% of the respondents reported  
16 delaying or postponing needed medical care in the previous year because of a fear of  
17 discrimination.<sup>12</sup> Delayed healthcare has been shown to increase the odds of transgender persons  
18 having depression and a suicide attempt by over three times.<sup>13</sup>

19  
20 <sup>10</sup> Health insurance coverage for gender-affirming care of transgender patients, [https://www.ama-](https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf)  
21 [assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf](https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf), p. 4 (citing Ashli Owen-Smith, et al.,  
22 Association Between Gender Confirmation Treatments and Perceived Gender Congruence, Body Image  
Satisfaction, and Mental Health in a Cohort of Transgender Individuals, 15 J Sexual Med 4, 591-600 (Apr. 2018)).

23 <sup>11</sup> Whooley MA et al., Depressive symptoms, unemployment, and loss of income. The CARDIA Study.,  
24 Arch Intern Med 2002 Dec 9/23; 162:2614-20, available at <https://pubmed.ncbi.nlm.nih.gov/12456234/> (noting  
results of a 12% increase in new unemployment during the five year period after reporting substantial depressive  
symptoms).

25 <sup>12</sup> U.S. Transgender Survey, p. 3.

26 <sup>13</sup> Seelman, et al., Transgend Health. 2017; 2(1): 17–28, available at  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5436369/> (last visited July 11, 2020).



22. Studies also demonstrate that lack of coverage of gender affirming healthcare services for transgender people leads to greater suicidality among transgender individuals.<sup>14</sup> We know that, among all Americans over the age of 18, the attempted suicide rate is only about 0.6%.<sup>15</sup> And yet, one study shows that 41% of transgender people in the United States have attempted suicide at least once in their life.<sup>16</sup> But the average rate of suicide attempts drops by approximately 20% for those who received gender affirming treatment.<sup>17</sup> If we assume that 41% of the transgender individuals who will lose healthcare coverage for transgender healthcare services as a result of the Final Rule can be expected to attempt suicide once in their lives, and that half of that number have already attempted it once, then we expect 2,161 to 6,669 people in this group may attempt suicide at least once in the future, and that this number will be 20% higher than it would be if the Final Rule did not take effect and cause them to lose healthcare coverage for gender affirming healthcare services. As a result, we would expect there will be approximately 527 to 1,627 more attempted suicides by transgender persons in Washington State over the next several decades, and, undoubtedly, more successful attempts.

23. The costs of attempted suicide and attempted suicide are substantial. Suicides and attempted suicides have other costs as well. The Centers for Disease Control and Prevention

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<sup>14</sup> 81 Fed. Reg. 31460-61 (citing California Economic Impact Assessment, Gender Discrimination in Health Insurance, <https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>, at 10–12); *Suicide Thoughts and Attempts Among Transgender Adults*, Findings from the 2015 U.S. Transgender Survey, Williams Institute, Sept. 2019, available at <https://williamsinstitute.law.ucla.edu/publications/suicidality-transgender-adults/>.

<sup>15</sup> Key Substance Use and Mental Health Indicators in the United States: Results from the 2018 National Survey on Drug Use and Health, p. 49, available at <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf> (last visited July 11, 2020).

<sup>16</sup> H.G. Virupaksha, et al., Suicide and Suicidal Behavior among Transgender Persons, *Indian J. Psychological Med.*, 2016 Nov-Dec, 38(6): 505-509, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5178031/> (last visited July 11, 2020).

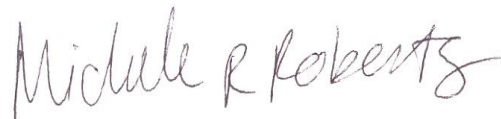
<sup>17</sup> California Economic Impact Assessment, Gender Discrimination in Health Insurance, <https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>, at 10–12 (last visited July 11, 2020).



1 estimates that each hospitalization for a suicide attempt costs \$33,000.<sup>18</sup> In Washington, there  
 2 were a total of 9,771 suicide attempts reported emergency room visits in 2019 resulting in a net  
 3 cost of \$322,443,000. However, as this data currently captures only 84% of emergency room  
 4 visits in the state, this estimate is projected to be higher for the entire state.<sup>19</sup> But this means that  
 5 attempted suicides by transgender persons who are denied healthcare coverage for gender  
 6 affirming healthcare services will cost tens of millions of dollars over the next decades if the  
 7 Final Rule takes effect.

8 24. The Centers for Disease Control and Prevention also estimate that each suicide  
 9 death costs an estimated \$1.3 million.<sup>20</sup> In Washington State there were a total of 1,254 deaths  
 10 by suicide in 2018, resulting in an estimated cost of just over \$1.63 billion. This is likely an  
 11 underestimate because not all suicide deaths are accurately captured as such. But the point is that  
 12 the cost of future suicide deaths in Washington State attributable to the loss of gender affirming  
 13 healthcare services caused by the Final Rule will be in the millions of dollars.

14 EXECUTED on this 12 day of July, 2020 in Seattle, Washington.

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19 MICHELE ROBERTS  
 20 Acting Assistant Secretary, Prevention and  
 21 Community Health, Washington State  
 22 Department of Health

22 <sup>18</sup> Washington State Department of Health. Washington State Suicide Prevention Plan,  
 23 <https://www.doh.wa.gov/Portals/1/Documents/Pubs/631-058-SuicidePrevPlan.pdf> (last visited July 11, 2020).

24 <sup>19</sup> Data from Emergency Department Surveillance of Nonfatal Suicide-Related Outcomes.  
 25 [https://www.federalgrants.com/Emergency-Department-Surveillance-of-Nonfatal-Suicide-Related-Outcomes-ED-](https://www.federalgrants.com/Emergency-Department-Surveillance-of-Nonfatal-Suicide-Related-Outcomes-ED-SNSRO-76556.html)  
 26 [SNSRO-76556.html](https://www.federalgrants.com/Emergency-Department-Surveillance-of-Nonfatal-Suicide-Related-Outcomes-ED-SNSRO-76556.html) (last visited July 11, 2020).

<sup>20</sup> Centers for Disease Control and Prevention. Preventing suicide: a technical package of policy, programs and practices. <https://www.cdc.gov/violenceprevention/pdf/suicideTechnicalPackage.pdf> (last visited July 11, 2020).